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No. 00-581

In The

Supreme Court of the United States

CBS, INC., and WESTINGHOUSE PENSION PLAN,

Petitioners,

v.

HARRY BELLAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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INTRODUCTION

Section 204(g) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C § 1054(g), generally prohibits plan amendments that decrease accrued benefits. In the Retirement Equity Act of 1984 ("REA"), Congress amended § 204(g) to extend its protection to early retirement benefits and retirement-type subsidies. Specifically, § 204(g) as amended provides in relevant part:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . .
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of . . . eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations) . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy. . . .

29 U.S.C § 1054(g).

At issue in the present case is whether a pension benefit payable for life is to be denied the protection of § 204(g) because it is triggered by layoff rather than by voluntary retirement.[1] It is Respondent's position that

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[1] Much of Petitioners' argument concerns the status of "shutdown" benefits, conditioned on closure of a plant rather

review by *certiorari* is inappropriate in this case because (i) Petitioners' claim lacks substantial merit; (ii) the conflict among the Courts of Appeals is more apparent than real; (iii) the position of the Internal Revenue Service does not support that of Petitioners; and (iv) the decision below will not have harsh consequences.

1. Petitioners' claim lacks substantial merit.

a. The decision below is clearly correct.

Before amendment, the Plan provided that employees meeting certain age and service requirements (such as age 50 with 25 years service) who were permanently laid off would receive a lifetime annuity based on years of service, equal to the normal pension benefit, without actuarial reduction for the earlier commencement and consequent longer duration of payments (hereinafter, the "Job Separation Pension"). Because it provides fixed periodic income throughout the employee's retirement

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than on the individual layoff of one or more employees. If the Court believes that issues concerning protection of shutdown benefits merit this Court's review, it should await a case that actually involves shutdown benefits. *See Bellas v. CBS, Inc.*, 221 F.3d 517, 540-42 (3d Cir. 2000) (Shadur, J., concurring) (Pet. App. 45a-49a). Because this Court might find layoff pension benefits protected without reaching any question as to shutdown benefits, a purported conflict over protection of shutdown benefits does not warrant review in this case. *Cf. The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (finding *certiorari* improvidently granted where case could be resolved without reaching issue in conflict, as resolution "can await a day when the issue is posed less abstractly").

years, this is a retirement benefit.[2] It is "early", in that it commences before the normal retirement age; and it is a "subsidy", in that the absence of actuarial reduction renders it more valuable over time than a normal pension.[3] Accordingly, the court below correctly determined the Job Separation Pension to be a "subsidized early retirement benefit,[4] protected [under § 204(g)] as an early retirement [benefit] to the extent of the actuarially reduced value of the normal retirement", with the balance protected as a retirement-type subsidy. *Bellas*, 221 F.3d at 538 & n.18.

Respondent, Harry Bellas, plainly met the pre-amendment conditions for the Job Separation Pension: he was over age 50 and had more than 25 years of pre-amendment service when he was laid off. Under the express terms of § 204(g), it is immaterial that he met the final condition – layoff – after an amendment purported to narrow and then eliminate the benefit. *See* 29 U.S.C § 1054(g)(2) (stating that protection of retirement-type subsidy applies with respect to participant who satisfies pre-amendment conditions "either before or after the amendment").

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[2] *Cf.* 29 U.S.C. § 1002(2) (defining "pension plan" to mean "any plan, fund or program . . . to the extent that [it] . . . (i) provides retirement income to employees. . . . ").

[3] The legislative history indicates that a "benefit subsidy" protected against reduction by § 204(g) is "the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit". S. Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574.

[4] The term "subsidized early retirement benefit" is used in the legislative history in describing an example of a benefit protected under § 204(g). S. Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574.

The decision of the court below is thus a straightforward application of an unambiguous statute. Because the Job Separation Pension is a subsidized early retirement benefit for which Bellas satisfied the pre-amendment conditions, the portion attributable to pre-amendment service – all of it, in Bellas's case – is an accrued benefit that could not be reduced or eliminated by amendment.

The Third Circuit's decision is strongly supported by the analysis of another Court of Appeals in a case squarely on point, as well as that of a third Court of Appeals in a well-reasoned opinion that was vacated on other grounds. *See Harms v. Cavenham Forest Indust., Inc.*, 984 F.2d 686, 692 (5th Cir.), *cert. denied*, 510 U.S. 944 (1993); *Richardson v. Pension Plan of Bethlehem Steel*, 67 F.3d 1462, 1467-68 (9th Cir. 1995), *rev'd on other grounds en banc*, 112 F.3d 982 (1996).[5]

b. Petitioners' interpretation is untenable.

Petitioners' principal argument – that the presence of a condition other than age and service makes the Job Separation Pension an unprotected "ancillary" benefit – is not grounded in the governing statute. The conditions under which a benefit will be paid do not alter its essential character as a retirement benefit *vel non*.

Section 204(g) expressly prescribes the effect of conditions: a retirement benefit is protected only if the conditions are eventually met. *See* 29 U.S.C § 1054(g)(2). This provision clearly contemplates that protected benefits

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[5] *See also Wallace v. Cavenham Forest Indus.*, 707 F. Supp. 455, 459-60 (D. Or. 1989).

may be subject to conditions, and it does not limit the conditions to age and service.[6] Moreover, regulations issued by the Internal Revenue Service include examples of protected benefits that encompass qualifying conditions other than age and service, such as "heavy and immediate financial need" or "permanent and total disability". 26 C.F.R. § 1.411(d)-4, Q & A-4(b).

Any doubt as to whether the conditions for a protected benefit may include involuntary separation from employment is resolved by the legislative history:

> The bill provides that the term "retirement-type subsidy" is to be defined by Treasury regulations. The committee intends that under these regulations, **a subsidy that continues after retirement is generally to be considered a retirement-type subsidy**. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or **a plant shutdown benefit (that does not**

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[6] When it enacted REA, Congress had available many reported common law decisions concerning early retirement benefits conditioned on requirements **other** than age and service. *See, e.g., Conner v. Phoenix Steel*, 249 A.2d 866, 868 (Del. 1966) (one condition was involuntary layoff); *Rothlein v. Armour & Co.*, 377 F. Supp. 506, 509 (W.D.Pa. 1974) (same). Congress was presumably aware of such common plan provisions when it addressed the post-amendment satisfaction of "conditions" in the statute. Had Congress intended to allow employees to grow into only age and service requirements, it could have stated that the benefit is protected provided an employee meets the age and service conditions either **before or after** the amendment, and all other conditions **before** the amendment.

> **continue after retirement age) will not be considered a retirement-type subsidy.** The committee expects that **Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected by the provision.**

S. Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576 (emphasis added).[7] The unavoidable implication of this passage is that shutdown benefits fall within the general rule that subsidies **continuing after retirement** are protected "retirement-type subsidies".[8]

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[7] Petitioners dragoon to their argument the legislative history of a quite different statute – the Omnibus Budget Reconciliation Act of 1987 ("OBRA") – enacted by a different Congress three years after REA. Pub. L. No. 100-203, § 9303, 101 Stat. 1330, § 9303 (1987). That history observes that "unpredictable contingent event benefits" are "not reliably and reasonably predictable." Petition at 5. It is difficult to discern any relevance of 1987 debates concerning a wholly different statute than the 1984 REA statute. *See United States v. Romani*, 523 U.S. 517, 536 (1998) (Scalia, J., concurring) ("[T]he will of a later Congress that a law enacted by an earlier Congress should bear a particular meaning is of no effect whatever. The Constitution puts Congress in the business of writing new laws, not interpreting old ones."). In any event, OBRA addressed an employer's duty to **fund** benefits, not whether § 204(g) protects the benefits' accrual. The debate is utterly silent as to the benefits' accrual or protection.

[8] As a panel of the Ninth Circuit explained in the (subsequently vacated) *Richardson* opinion:

> We believe that if Congress had wanted to indicate that shutdown benefits were not retirement-type subsidies, it would have said so. By contrast, Congress said only that a shutdown benefit "that does not continue after normal retirement" was not a retirement-type subsidy. That statement, in

Petitioners also now contend that § 204(g), together with all of ERISA's accrual provisions, is wholly inapplicable because the Job Separation Pension is a "benefit[ ] in the event of . . . unemployment", and therefore a welfare benefit rather than a pension benefit. Petition at 20. This is a new argument, not presented to the courts below.[9] In any event, Petitioners' contention is patently incorrect. In the first place, the benefit is conditioned on job separation, not on unemployment or failure to find other work.[10] In the second place, ERISA and implementing regulations expressly recognize that payments conditioned on separation from employment generally constitute pension benefits. The statute provides that the Secretary of the Treasury may prescribe rules under which "severance pay arrangements" shall be "treated as welfare plans rather than pension plans". 29 U.S.C. § 1002(2)(B). Under those rules, arrangements for severance benefits – paid "on account of the termination of an employee's service" – are deemed not to constitute pension plans only if they comply with stated limits on

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> conjunction with Congress' general assertion that a subsidy that continues after retirement is a retirement-type subsidy strongly implies that shutdown benefits that do continue after retirement age are retirement-type subsidies.

Richardson, 67 F.3d at 1468 n.4.

[9] *Cf. Delta Airlines v. August*, 450 U.S. 346, 362 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court").

[10] That is, one receives a Job Separation Pension for life, even if one is re-employed elsewhere shortly after layoff.

amount and duration. Treas. Reg. § 2510.3-2(b).[11] The clear import is that severance plans that do not meet the regulatory criteria *are* deemed to constitute pension plans. There would be no need for these statutory and regulatory provisions permitting alternative treatment as welfare plans if payments conditioned on separation from employment were not otherwise regarded as pension plans.

2. The conflict among the Courts of Appeals is more apparent than real.

The court below held that a participant who meets all conditions for a lifetime job separation benefit may not be deprived of the benefit by an amendment. None of the cases cited by Petitioner stands for the contrary proposition – *viz.*, that an amendment may cut back a lifetime job separation benefit with respect to a participant who satisfies all pre-amendment conditions for the benefit.

First, in the *Ross* case, none of the plaintiffs met the age and service conditions for the shutdown benefit. *See Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329, 330-31 (6th Cir. 1988).[12] As the *Ross* court explained, under "a plain reading of the Plan language":

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[11] The maximum duration for a severance benefit not to constitute a pension is 24 months after normal retirement age. *See* Treas. Reg. § 2510.3-2(b)(iii). Because it provides a benefit "for the lifetime of the Employee", the Job Separation Pension at issue herein clearly does not meet this limitation.

[12] Those employees who did meet the eligibility conditions received the shutdown benefit. *See id.* at 331 n.1.

> In order to qualify for the . . . plant shut-down benefit, these plaintiffs had to meet the specified age and service requirements at the date upon which the plant was permanently closed. Because they did not meet these requirements, they are not entitled to receive the plant shut-down benefits.

Id. at 334-35.[13] Thus, the court had no occasion to address whether an amendment may impair the shutdown benefit for participants who meet the requirements.[14] Because the protection of § 204(g) for retirement-type subsidies is expressly limited to participants who satisfy the pre-amendment conditions, the *Ross* court's discussion of whether shutdown benefits are entitled to such protection is simply *dicta*.[15]

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[13] Although this observation was addressed to the alternative claims of only some of the plaintiffs, it was equally applicable to all.

[14] Indeed, *Ross* involved neither qualifying participants nor an actual amendment to the plan. The district court rejected the plaintiffs' argument that the shutdown itself was equivalent to an amendment, and the Sixth Circuit declined to address the issue, as it affirmed on other grounds. *See Ross*, 847 F.2d at 332 & n.2.

[15] Moreover, the *Ross* court's conclusion that shutdown benefits are unprotected under § 204(g) is not based on careful analysis, but rather is supported only by a cursory misreading of the legislative history of REA. *See Ross*, 847 F.2d at 333-34 (concluding that the legislative history "specifically states" that a plant shutdown benefit does not fall within the category of a retirement-type subsidy, based solely on the statement reproduced *supra* at 5-6 which by its terms was limited to a benefit "that does not continue after retirement age"). As the court below concluded: "There is no discussion in *Ross* of whether the plant shutdown benefits there continued beyond

Second, in the *Roper* case, as in *Ross*, the plaintiffs failed to meet age and service requirements and there was no plan amendment. *See Roper v. Pullman Standard*, 859 F.2d 1472, 1473 (11th Cir. 1988) (per curiam). Moreover, *Roper* did not even purport to address § 204(g) or the meaning of "retirement-type subsidy". And finally, the *Roper* court expressly acknowledged that "the analysis borrowed from *Ross*" was "not necessary to our decision to affirm". *Id.* at 1474. *Roper* thus cannot be considered substantial authority in conflict with the decision below.

Third, the *Rombach*[16] and *Arndt*[17] cases involved disability benefits, rather than lifetime job separation benefits. Unlike shutdown benefits, disability benefits are defined by ERISA as welfare benefits, and their exclusion from "retirement-type subsidies" in the legislative history is not expressly limited to benefits that do not continue after normal retirement age.[18] Cases involving such

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normal retirement age. Accordingly, . . . the *Ross* court's analysis of the issue does not provide a basis upon which to decide this matter." *Bellas*, 221 F.3d at 532.

[16] *Rombach v. Nestle USA, Inc.*, 211 F.3d 190 (2d Cir. 2000).

[17] *Arndt v. Security Bank S.S.B. Employees' Pension Plan*, 182 F.3d 538 (7th Cir. 1999).

[18] *See* 29 U.S.C. § 1002(1) (defining "welfare plan" to mean "any plan, fund or program . . . to the extent that [it provides, *inter alia*] . . . benefits in the event of . . . disability"); S. Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576 ("a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy").

different benefits do not create a conflict requiring *certiorari* review.

3. The position of the Internal Revenue Service does not support that of Petitioners.

As an initial matter, the General Counsel Memorandum ("GCM") on which Petititoners pin their hopes does not constitute the "regulations" contemplated by the text of § 204(g) to define "retirement benefit" or "retirement-type subsidy", and is therefore not entitled to judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As this Court explained last Term:

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in [*Skidmore*], but only to the extent that those interpretations have the "power to persuade".

Christensen v. Harris County, 529 U.S. 576, 120 S. Ct. 1655, 1662-63 (2000) (citations omitted), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Here, the GCM does not even set forth the official position of the Internal Revenue Service ("IRS"). *See* IRS

Manual § 39(10)71(4) (1992) ("General Counsel Memorandums are internal legal opinions and do not represent the positions of the Internal Revenue Service"). Indeed, the GCM, as it appears in electronic databases such as Lexis and Westlaw, commences with a warning that: "This document is not to be used or relied upon or otherwise cited as precedent by taxpayers."[19] A document that the IRS deems insufficiently authoritative to allow reliance by taxpayers should not be accorded substantial reliance or deference by the courts.[20] Hence, a purported conflict

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[19] *See* Joint Appendix filed in the Court of Appeals at JA0117. This caveat is consistent with the Internal Revenue Code and IRS procedures. *See* 26 U.S.C. § 6110(b)(1) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent"); 26 U.S.C. § 6110(k)(3) (defining term "written determination" to include "Chief Counsel advice"); IRS Manual § 424(14).3(3) (1981) (specifying that General Counsel Memoranda "shall not be used as precedents in the disposition of other cases").

[20] It is not surprising that courts have refused to rely on GCMs authored by IRS counsel. *See, e.g., Disabled American Veterans v. Commissioner*, 942 F.2d 309, 315 n.5 (6th Cir. 1991) ("Such informal, unpublished opinions of attorneys with the IRS are of no precedential value, and we are not prepared to rest a specific interpretation of a law passed by Congress on what may be nothing more than the general considerations of these government employees."); *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1105 (5th Cir. 1990) ("[The GCM] is not binding. It is an internal document reviewing a proposed ruling in a specific case."); *Stichting Pensioenfonds Voor De Gezondheid v. United States*, 129 F.3d 195, 200 (D.C.Cir. 1997) ("These 'GCMs,' however, have no precedential value."); *Sierra Club, Inc. v. Commissioner*, 86 F.3d 1526, 1534 (9th Cir. 1996) ("IRS internal memoranda . . . are not binding on the IRS or on this court."); *Tupper v. United States*, 134 F.3d 444 (1st Cir. 1998).

with such a non-precedential GCM is not of sufficient moment to warrant *certiorari* review.

In any event, the GCM simply does not support Petitioners' interpretation of § 204(g). Petitioners contend that benefits contingent on layoff or shutdown are not retirement-type subsidies, but are ancillary benefits that are never protected under § 204(g). The GCM takes a flatly contrary position. First, it repeatedly states that shutdown benefits **are** retirement-type subsidies, so long as they continue after retirement age.[21] Pet. App. 92a, 99a, 101a.[22] Second, the GCM states that such benefits are protected under the Internal Revenue Code provision that parallels § 204(g): "if provided as retirement-type subsidies, shutdown benefits are accrued benefits and therefore protected". Pet. App. 101a.

Petitioners read too much into the GCM's statement that retirement-type shutdown benefits "become an accrued benefit and therefore protected . . . upon the occurrence of the event that triggers the right to the

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[21] As an example of a shutdown benefit that continues beyond normal retirement age, and is thus a retirement-type benefit, the GCM cites "reduc[tion of] the age or service eligibility requirements for the normal retirement benefit". Pet. App. 97a. The example fits the present case precisely: the benefit at issue herein is simply a normal retirement benefit with reduced age / service requirements.

[22] The GCM found this result to be indicated by "the legislative history of REA". Pet. App. 101a. *See also Richardson*, 67 F.3d at 1468 n.4, 1469 (quoting legislative history and GCM in support of conclusion that shutdown benefits that continue after retirement age are retirement-type subsidies for purposes of § 204(g)).

benefits". Pet. App. 101a. This appears to be simply another way of stating the statutory limitation of protection to participants who eventually satisfy the conditions for a retirement-type subsidy. *See* 29 U.S.C. § 1054(g). Nowhere does the GCM indicate that an intervening amendment can prevent the benefit from becoming accrued and protected, or that the triggering event must occur before any such amendment. The GCM is simply silent on this, the ultimate issue in the present action.[23] The GCM is therefore not inconsistent with the result reached by the courts below.

4. The decision below will not have harsh consequences.

The primary result of the lower courts' decision that layoff benefits are protected under REA is that Petitioners will have to pay benefits previously promised to employees. Petitioners' alarm about "widespread and harsh consequences" to plan sponsors and beneficiaries based upon a "threat of immediate disqualification for federal income tax purposes", Pet. 17-18, is unfounded.

The Court of Appeals did indeed recognize that "there may be significant adverse tax consequences as a result of this opinion if relief from sources other than this court is not granted." *Bellas*, 221 F.3d at 539 (Pet. App. 43a-44a). The court's reference to "sources other than this

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[23] ERISA is not silent on the issue, however. Section 204(g) expressly states that a retirement-type subsidy is treated as accrued and is protected from cut-back if the conditions are satisfied "either before or after the amendment".

court" reflects a recognition that the answer to Petitioners' tax concerns does not lie with the judiciary. In the first instance, relief lies with the IRS, as only that agency has the power to rescind the Plan's tax qualified status. The Plan does not automatically lose its favorable tax status as a result of the decision; disqualification will occur only if the IRS takes affirmative steps. Moreover, from the time of the favorable IRS determination letter until resolution of this case, CBS can rely on the letter. The IRS is unlikely to nullify a plan's tax-qualified status **retroactively**, and if Petitioners simply comply with the decision by eliminating the illegal amendment, there will be no problem with prospective qualification. *Cf.* Stephen R. Bruce, *Pension Claims Rights and Obligations* 759-60 (2d ed. 1993) ("Except in rare or unusual circumstances, the revocation or modification of a [favorable determination letter] will not be applied retroactively.").

Against this background, the court's expression of "hope that the appropriate authorities take note of this problem and take steps to alleviate it", *Bellas*, 221 F.3d at 539 (Pet. App. 44a), refers to the IRS, which can readily avoid any harsh tax consequences. The passage does not, as Petitioners suggest (Pet. 19), amount to an invitation to this Court to reverse its decision.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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